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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 107

B. C. D. BYNUM, Individually, and B. C. D. BYNUM and EARL COBB, as Independent Executors and Trustees under the Last Will and Testament of MARIE BYNUM SMITH, Deceased,

Petitioners,

vs.

PHILLIPS PETROLEUM COMPANY,

REPLY TO PETITION FOR WRIT OF CERTIORARI

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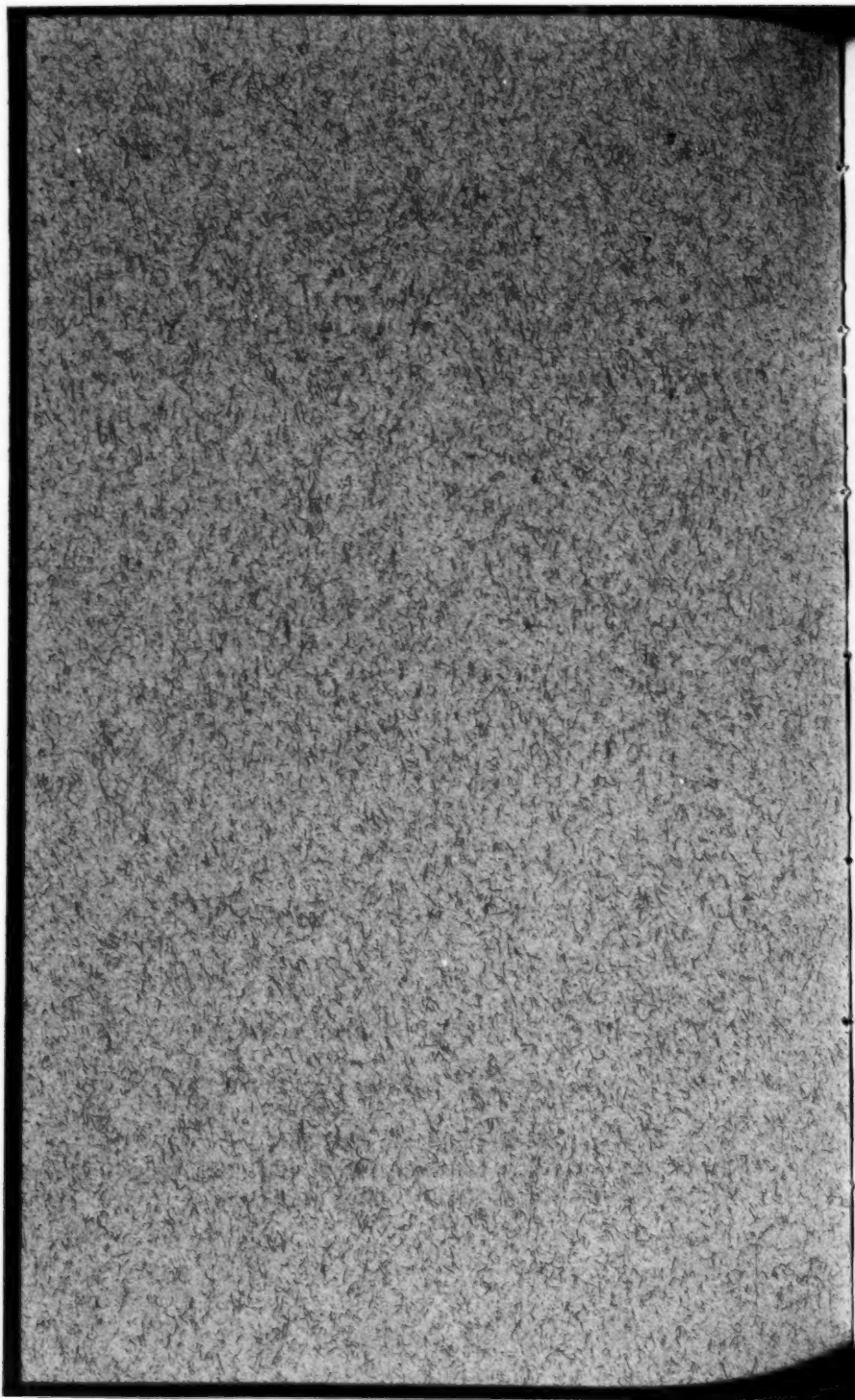

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 107

B. C. D. BYNUM, INDIVIDUALLY, AND B. C. D. BYNUM AND EARL COBB, AS INDEPENDENT EXECUTORS AND TRUSTEES UNDER THE LAST WILL AND TESTAMENT OF MARIE BYNUM SMITH, DECEASED, *Petitioners,*

vs.

PHILLIPS PETROLEUM COMPANY

REPLY TO PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Additional Statement of Matters Involved

Petitioners' Statement of the Matters Involved (Pet. p. 4) is so incomplete that it does not give a fair picture of the record before the Court of Appeals. None of the gas produced from the Bynum well was sold at the well. A portion of the gas was taken into the pipelines of Phillips Petroleum Company [1] and delivered into its Sanford, Canadian, John-

[1] Respondent will be sometimes referred to as Phillips Petroleum Company, Phillips, or the Defendant, and Petitioners collectively as Plaintiffs.

son, Rock Creek, Carson and Pantex Gasoline Plants for the manufacture of gasoline. A part of the gas taken into the pipelines of Phillips was delivered to the Cactus Gas System from which it was delivered to the Cactus Ordnance Works at Etter. A part of the gas was delivered to Texoma Natural Gas Company (R. 437-8).

Plaintiffs alleged that during the entire period there had been no market for the gas produced from the Bynum well, and that therefore the standard of payment of ⅛th of the market price set forth in the lease failed and plaintiffs were entitled to be paid on the basis of the fair and reasonable value of the gas at the well, alleging such value had, at all times, been 4½¢ per m. c. f. (R. 6-7).

Plaintiffs sought to support their allegation that there was no market price for gas of the character produced from the Bynum well by proof that no sweet gas was bought and sold at the wells in Moore County where the Bynum well was located, although the Panhandle Gas Field is a common reservoir producing dry sweet, dry sour, and casinghead gas, and covers portions of Wheeler, Gray, Carson, Potter, Hutchinson, and Hartley Counties, Texas, in addition to Moore County. Plaintiffs sought to prove the actual value of the gas, assuming that they had established no market price, by showing the royalties paid by interstate pipeline companies to royalty owners under their own leases under contracts which included other considerations of substantial value to the pipe line companies in addition to the agreement fixing the royalty price. No proof was made of the value of such other considerations (R. 136, 141-7, 151-9, 160-7, 170-1, 192-227, 245-271, 275-346, 520-523). Plaintiffs further showed the prices paid by one pipeline company under three or four contracts whereby it purchased gas delivered into its pipeline under long term contracts containing other considerations of substantial value to the

pipeline company in addition to the gas delivered, without any proof of the value of such considerations (R. 348-56, 358-62, 362-79, 382-86, 396).

Plaintiffs admitted and the Court of Appeals found (Orig. Op. R. 539) that there was no market for gas in the Panhandle Gas Field to the interstate pipeline companies which control the transportation of gas to distant markets in other states. The representatives of the various pipeline companies, testifying for plaintiffs, so stated in unequivocal terms (R. 148-9, 194, 389-90). On the other hand, the same witnesses testified that there was a market for non-pipeline gas like the Bynum gas, which did not have entry into the pipeline market, to the gasoline plant operators for gasoline plant operating purposes, and that such was a matter of common knowledge in the area (R. 175-6, 178, 195, 392-3).

The Court of Appeals found (Orig. Op. R. 537) "The Plaintiffs, perforce, must concede that there is a market for the gas, for if they had no market or outlet it would be without either actual or market value. Admittedly, the gas here has an outlet to the gasoline plants of the Defendant and without doubt the gas from the Bynum well, which is transported by pipelines to five or six of the Defendant's gas reduction plants, could readily be delivered to other producers of gasoline for such gas. For the Plaintiffs to argue against its availability to market is for the Plaintiffs to decry its value—both market and intrinsic."

In effect, plaintiffs' attack on the Court of Appeals decision is based on the contention, first, that they sustained the burden of showing no market price by proof of the absence of sales of gas at the wells in Moore County, a political subdivision, in the face of undisputed evidence that there were such sales of similar gas at the wells throughout the field to gasoline plant operators for the same utilization to which the Bynum gas was put, and second, that proof of

the pipeline prices was admissible to show the actual value of the gas in the face of the undisputed evidence that the pipeline companies afforded no market for non-pipeline gas at any price, and that the pipeline prices were coupled with other considerations of substantial value to the pipeline companies, the value of which was not shown. In this reply we will show that such holdings of the Court of Appeals were not only not in conflict with applicable local decisions and prior decisions by the same Court of Appeals, but were in accord therewith, and merely applied well-recognized principles of Contract Law.

Reply to Reason One

As their first reason for granting the petition (p. 11) Petitioners assert that the holding of the Court of Appeals that, "in view of the Texas law that the royalty owner has no title even to the 1/8th part of the gas, and that only the contractual relation of creditor and debtor exists, we are unable to fasten the obligation to make a full disclosure where it really ought to be," is a decision in conflict with applicable local decisions. *The quoted portion of the opinion is immaterial to the court's decision until related to the sentence which follows it, which expresses the conclusion the court drew from the statement made.* This sentence reads as follows: "We are obliged to hold that the burden is on the plaintiffs to show first, that there was no market price at the well for gas in question, before they should be permitted to introduce evidence as to the actual or reasonable value thereof." This is the holding of the Court of Appeals which plaintiffs are *indirectly* attacking under this point. When the record is made clear it will be obvious why plaintiffs made their attack by indirection. Until the filing of their Petition in this court Petitioners never contended that the burden of proving that there was no

market price did not rest on them. They assumed that burden in their complaint (R. 6-7). In their brief before the Court of Appeals at Page 36, plaintiffs admitted this burden, stating, "*Plaintiffs rested under the burden of establishing two facts, (a) that no market price existed,* and (b) the fair value." Having taken such position in the lower courts, plaintiffs are estopped from asserting the contrary in this court.

Boatner v. *Providence-Washington Insurance Co.*, 241 S. W. 136 (Tex. Com. App.);
City and County of Denver v. *Denver Tramway Corp.*, 23 Fed. (2) 287 (8th C. C. A.);
Paxton v. *Travis County*, 129 S. W. (2) 362 (Tex. C. C. A.);
Saulsbury Oil Co. v. *Phillips Petroleum Co.*, 142 F. (2) 27 (10th C. C. A.).

But plaintiffs did not gratuitously assume a burden which the law had not placed on them. The lower court's holding on the question of burden of proof is in literal accord with the Texas decisions. *It has long been the rule in the Texas Courts, as elsewhere, that a plaintiff seeking to recover actual value as the measure of his damages, must first allege and prove that there was no market value for the commodity before proof of actual value is admissible.*

International-Great Northern Railroad Co. v. *Casey*, 46 S. W. (2) 669 (Tex. Com. App.);
Continental Oil & Cotton Co. v. *Wristen & Johnson*, 168 S. W. 395 (Tex. C. C. A.);
Texas Warehouse Co. v. *Imperial Rice Co.*, 164 S. W. 396 (Tex. C. C. A.);
Phillips Petroleum Co. v. *Ochsner*, 146 F. (2d) 148 (5th C. C. A.).

It is immaterial, therefore, whether the relationship between the lessor and lessee was one of debtor and creditor, principal and agent, or trustee and beneficiary. However, if the relationship of the parties be deemed material, it is to be noted that plaintiffs cite no Texas case, and no case by any other court, holding that any fiduciary or trust relationship exists between a lessor and lessee of an oil and gas lease. The authorities are to the contrary.

O'Donnell v. *Snowden & McSweeny Co.*, 149 N. E. 253 (Ill.);

Kretni Development Co. v. *Consolidated Oil Corporation*, 74 F. (2d) 497 (10th C. C. A., Writ of Cert. Den.);

Cooper v. *Ohio Oil Company*, 25 F. Supp. 305 (D. C. Wyo.), Aff. 108 F. (2d) 535;

Texas Company of Mexico v. *Roos*, 43 F. (2d) p. 1 at 14 (5th C. C. A.);

Armstrong v. *Skelly Oil Co.*, 55 F. (2d) 1056 at 1068;

Hoffman v. *Magnolia Petroleum Company*, 260 S. W. (Tex. C. C. A.), Reversed on other grounds 273 S. W. 828;

United States v. *Sinclair-Prairie Oil Co.*, 21 F. Supp. 179 (D. C. Okla.);

Texas-Pacific Coal & Oil Co. v. *Bruce*, 233 S. W. 535 (Tex. C. C. A.);

Hemrick v. *Standard Oil Company*, 91 F. 332 (3rd C. C. A.).

Furthermore, plaintiffs' assertion that the burden of proving the absence of a market value should rest on defendant because the existence and amount of a market price lay within its peculiar knowledge is absurd. The Court of Appeals held (Op. Reh. R. 557) that "*Market price of gas is determined by sales of gas comparable in time, quantity,*

quality and availability of marketing outlets." This is no more than a restatement of the universally recognized rule.

It is obvious that such a market price does not rest within the peculiar knowledge of any single buyer or seller of gas, but is a matter of common knowledge, or one which can be readily ascertained by inquiry. It is true that defendant, being in the business of buying and selling gas, probably had a greater initial knowledge of the prices being paid by it and others than that of the ordinary lessor. Such, however, is not and never has been the test of determining burden of proof, and no case cited by petitioners in Texas or elsewhere purports to so hold. Defendant's knowledge of its own purchases and sales was readily available to plaintiffs through an audit of its books, interrogatories, depositions, demands for admission of facts and subpoenaing of witnesses. It is significant that plaintiffs took advantage of the right to address interrogatories to defendant, but that not one interrogatory relating to the prices paid for gas bought and sold by this defendant was asked (R. 435). The prices paid for gas by other purchasers and sellers were as available to plaintiffs as they were to defendant. Plaintiffs made no effort to secure any such testimony, but relied exclusively on their legal theory that the absence of purchases and sales in a political subdivision discharged their burden of proving the absence of a market price for gas.

Reply to Reason Two

Petitioners' second reason for granting the writ (Pet. p. 15) is that the Court's holding that the market price provision in the lease does not mean "market price at the Bynum well, but it means the price which similar gas brings at the mouth of the wells generally in the field" is in conflict with applicable local decisions. Plaintiffs' argument here is that the words in the lease—"market price at the well"—

limits the determination of market price to sales made at the Bynum well, and that sales made elsewhere in the field, although at the wells, were not determinative of market price. The quoted portion of the Court of Appeals opinion on rehearing which plaintiffs attack must be read in the light of the language which follows immediately thereafter: "To hold otherwise would render the term meaningless, for obviously none but the lessee has taken, or can take under the present contract, gas from the mouth of that well, and it was never the intention of the parties to allow the lessee to fix the price by the price that it fixed. It could not set its own price as the standard of right, *for it was intended that it should be required to pay as much as other similar purchasers were paying in comparable purchases of similar gas* (Op. Reh. R. 557).[2] The Court of Appeals definition of what determines market price in the opinion for rehearing (R. 557), "Market price of gas is determined by sales of gas comparable in time, quantity, quality and availability to marketing outlets," makes it clear that the Court was simply holding that sales of other gas of comparable quality made at the wells where produced, where so located that such gas had an availability to market comparable to the Bynum gas, determined the market price of the Bynum gas.

Market price or value is always determined by the prices paid for sales of other units of the same commodity made under circumstances substantially similar to the facts relating to the commodity to be evaluated. Here the issue was the market value of the Bynum gas at the Bynum well as plaintiffs contend. But such value is determined by sales of other similar gas in the field that is also sold at the wells as produced. As the Court of Appeals held, any other construction would obviate the possibility of there ever being a market price for the Bynum gas and defeat the

[2] All emphasis in the Brief is supplied.

expressed intent of the parties. The parties must have known that gas produced from other wells would be sold at the wells from which it was produced and not at the Bynum well and have contemplated that the prices paid in such sales would fix the market price of the Bynum gas.

Plaintiffs' contention that there was no market for the Bynum gas because no one was purchasing sweet gas at the wells in Moore County is refuted by the admitted fact that the well was produced into defendant's pipe line and transported to defendant's plants in another county where it was used for the manufacture of gasoline (Orig. Op. R. 537).

In its original opinion (R. 537) the Court made it clear that the inquiry into sales was not a matter to be fixed by the artificial lines of a political subdivision but by economic factors. The Court said, "*We say that it is not a matter of geography, nor of county lines, nor of the area embraced in a particular field, but that it is a matter of business, of economics, of supply and demand, and of the existence and availability of a market.*" This is the holding to which Petitioners' attack is really addressed. We submit that it is so obviously correct as not to be susceptible of argument. The Court next pointed out that plaintiffs must necessarily concede that there was a market for the Bynum gas, because if there had not been it would have had no value, either actual or market, and that it was admitted that the gas had an outlet to the gasoline plants of defendant, and continued, "The question, therefore, is not what happens in Moore County, but *whether or not there have been recent, substantial and comparable sales of like gas* to gasoline plants, carbon black plants and the like *from wells in the area whose availability for marketing is reasonably or substantially similar to that of the gas herein involved.*"

In so holding the Court of Appeals neither stated nor applied any new principles of law in determining market

value, and no Texas case cited by petitioners is in conflict with the rule announced by the Court. The extent of the area within which sales will be considered as comparable must be determined on the facts of each case giving consideration to nature of the commodity involved, the marketing customs of the trade, and the economics of supply and demand.

The ultimate issue was admittedly the market price of the Bynum gas at the Bynum well. Since, however, the Bynum gas was not sold at the Bynum well, that price could be determined only by the sales of similar gas at the wells where such gas was produced, provided such sales were made under similar circumstances, and it is to be noted that the court carefully limits its opinion by the inclusion of such proviso. Petitioners in effect denied their own contention when they offered proof of lack of sales in Moore County. The error they fell into was in assuming that the boundaries of such a political subdivision were determinative of the area within which sales of similar gas at the wells would be held comparable in determining the maket price of the Bynum gas at the Bynum well.

The Court's holding in this regard is entirely compatible with the Texas cases cited by Petitioners and with its recent opinions in *Shamrock Oil & Gas Corporation* v. *Coffee,* 140 F(2) 409, *Phillips Petroleum Company* v. *Ochsner,* 146 F(2) 138, and *Phillips Petroleum Company* v. *Record,* 146 F(2) 485.

It is submitted that the court's definition and application of the term, market price at the well, is not shown to have been in any way in conflict with either local decisions or with the well-established principles of proof of market price.

Reply to Reason Three

Petitioners' third reason (Pet. p. 20) for this court taking jurisdiction is the asserted importance to royalty owners in the Panhandle Gas Field of the issues involved in this case. While the rules of this court provide no such ground for granting a writ of certiorari, it should be stated that the question is one of importance, not only to royalty owners, but also to producers of non-pipeline gas who, under plaintiffs' theory, would be obligated to pay royalties at a price for which they cannot sell the gas because the interstate pipeline companies do not enter the market and buy gas at that or any other price and whose only market outlet is to the gasoline plant operators at a substantially smaller price. It is submitted that the questions both of law and fact are local ones with which the Court of Appeals is thoroughly familiar, as shown by the long line of cases cited in the petition, and the importance of the issue to the litigants (virtually all litigation is important to the litigants involved and to others similarly situated) reveals neither the necessity nor the advisability of this court taking jurisdiction in the case.

Reply to Reason Four

The fourth reason urged by petitioners (Pet. p. 21) is that the court's holding that the prices paid by the interstate pipeline companies were not admissible as proof of the actual value of the Bynum gas, was in conflict with the applicable local decisions. At the outset it should be noted that petitioners cite no Texas case with which such holding is claimed to be in conflict. They merely cite the rule, which obtains generally, stated in Texas Jurisprudence, that wide latitude in evidence is permissible in proving actual value.

Nothing in the opinions of the Court of Appeals denies this general rule. The court merely found that the testimony offered was not qualified under the rule because it did not have any reasonable relationship to the value of non-pipeline gas which had no entry into the so-called pipe line market, and because the prices offered by plaintiffs were coupled with other goods of substantial value to the pipeline companies without acompanying proof of the value of such other considerations so that a jury could determine the actual value of the gas alone (Orig. Op. 538-9, Reh. Op. 556-7).

As a matter of fact, most of the argument on this point is addressed to an attempted showing that the court's holding was contrary to its previous holdings in the line of cases decided by the Court of Appeals which arose from the Louisiana Gas Fields. This line of cases is commonly called the *Sartor* cases,[3] and we will refer to them collectively by that name.

Petitioners' attack does not do justice to either the Court's opinion in this case, nor to the record. All the court held in the *Sartor* cases was that where no gas was sold at the wells but there was a market for the gas to pipeline companies under contracts for long terms which contained other considerations of value to the pipe line companies than the gas itself, there was no market price for the gas, but the pipeline contract prices were admissible as proof of actual value when accompanied by proof of the value of the other considerations in order that the jury might deduct such sums from the prices paid and arrive at the actual value of the gas at the wells.

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[3] *Arkansas Natural Gas Co.* v. *Sartor*, 78 F. (2d) 924; *Sartor* v. *United Gas Public Service Co.*, 84 F. (2d) 436; *Hemler* v. *Hope Producing Co.*, 117 F. (2d) 231; *Union Producing Co.* v. *Driskell*, 117 F. (2d) 229; *Union Producing Co.* v. *Pardue*, 117 F. (2d) 225; *Sartor* v. *Arkansas Natural Gas Co.*, 134 F. (2d) 433.

The record here is entirely different, as the Court of Appeals points out. There was no market in the Panhandle Field for non-pipeline gas, such as that produced from the Bynum well, to the pipeline companies because, for reasons of their own, they refused to purchase it, so that the royalty prices paid by the pipeline companies to their own royalty owners on gas produced from their own leases was wholly immaterial as a factor determining the value of non-pipeline gas which had no entry into the interstate pipelines at that or any other price. Furthermore, plaintiffs here utterly failed to show the value of the other considerations to the pipeline companies in addition to the gas so the jury would have been in position to ascertain by deduction the value of the gas alone at the wells. These distinctions, which petitioners entirely ignored, are made clear in both the original opinion (R. 538-9) and the opinion on rehearing (R. 556-7). It is submitted that the Court's holding in this regard is in conflict neither with the general rule of proof of actual value announced in Texas Jurisprudence nor with prior decisions by the Court of Appeals, but is in entire accord therewith.

Reply to Reason Five

Plaintiffs' fifth reason (Pet. p. 24) for this court taking jurisdiction is the contention that the decisions of the Fifth Circuit Court of Appeals with respect to the rights of a lessor to payment of royalty at the market price at the well, and the evidence appropriate for consideration in a suit involving those rights are in such a chaotic and confused state that this Court should exercise its supervisory powers by granting a writ. There is, of course, no such ground for a writ of certiorari in the rules of this court. Aside from that fact, and if plaintiffs' assertion were true (which it is not) that the decisions of the Court of Appeals are in a chaotic state concerning the meaning and proof of market

price and actual value, such chaos was clearly laid at rest by the Court of Appeals opinions in the present case.

In their brief in support of their petition for rehearing in the Court of Appeals, plaintiffs made the same contention they make under this point. They asserted that the Court's opinion left the royalty owner without any guide as to how to proceed in his proof of the absence of market price and the amount of actual value. In response the Court of Appeals in its opinion on rehearing (R. 556-7) listed in one, two, threes the rules which were applicable to the various types of evidence as proof of market price and actual value. We repeat that if there were ever any doubt as to what such rules are, and if there were ever any conflict between the decisions of the Court of Appeals, such doubt and such conflict were laid at rest in as clear and explicit a manner as was possible in the Court's opinion on rehearing.

However, the chaos complained of is a figment of Petitioners' desire. The so-called chaos asserted is primarily with reference to the Court's holding that the pipeline prices were admissible as proof of actual value in the *Sartor* cases, but not in this case. We have already pointed out that the alleged conflict does not exist and the difference in the holdings in the two lines of cases is based on a valid distinction in the facts. The Court in its present opinions in nowise retracts from nor varies the rules announced concerning the admissibility of pipeline prices announced in the *Sartor* cases, but expressly distinguishes those cases (R. 556).

Petitioners also contend that the opinion in the present case is in conflict with statements in the Sartor cases concerning the necessity that there be "daily" sales of gas for a market price to exist. On that point the court here held that the existence of a market price did not depend on "daily" sales and that the nature of the commodity involved rendered it unnecessary that business connected

with it be transacted on the basis of daily market fluctuations such as exist in the case of cotton, wheat or corn, and that when seeking the market value of gas at the well the Court could not require the application of the rules of daily sales and daily quotations when no such sales and quotations occur (R. 538). It is enough if such sales occur with such frequency that the court or jury can find that they fairly represent the value of the commodity to be evaluated. Statements in the Sartor cases concerning daily market prices must be construed in this manner. The Court obviously so construed them since it cited *Sartor* v. *United Gas Public Service Co.*, 84 F(2) 437, in support of its conclusion. The rule announced by the Court concerning "daily" sales is so obviously correct as to require no citation of supporting authority. Courts have never required proof of daily sales to establish the market value of commodities such as land, milk cows, oil, timber, and the like, which are not the subject of public marketing and daily quotations.

The confusion which petitioners find in the decisions is of petitioners' own making. Had petitioners been willing to accept the prices currently paid for gas bought and sold at the wells by gasoline plant operators in the only market available for the Bynum gas instead of seeking to recover pipeline prices which the producer could not secure for the gas, petitioners would have found no confusion in their proof of the market price of the gas and would have had no difficulty in securing from defendant and other gasoline plant operators, who purchased gas at the wells in the field, the prices paid therefor. It is only because Petitioners sought to ignore the relevant facts for determining market price and to recover on a wholly fictitious valuation of the gas that they were unable to make out a prima facie case to go to the jury. The difficulties in which Petitioners

found themselves were of their own making, not defendant's nor the Court's. The Court of Appeals did no more than to direct them to go back to the District Court and ascertain the actual facts with regard to the purchase and sale of gas in the only market available for the disposition of their gas.

Conclusion

For the reasons stated, it is submitted that the petition states no valid ground for the granting of a writ of certiorari, and that the decision of the Court of Appeals was neither in conflict with applicable local decisions nor with prior decisions by the same Court, but was in entire accord with such decisions and with the well-recognized principles of law applicable to the issues in this case.

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